STATE OF MICHIGAN

COURT OF APPEALS

DEMATTIA INVESTMENTS, L.L.C.,

Plaintiff/Counterdefendant-Appellee,

v

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY,

Defendant/Counterplaintiff/Cross-plaintiff-Appellant,

and

PHILIP R. SEAVER TITLE COMPANY,

Defendant/Cross-defendant-Appellee.

UNPUBLISHED
July 18, 2000

No. 211749
Wayne Circuit Court
LC No. 98-802426-CK

Before: Meter, P.J., and Griffin and Owens, JJ.

OWENS, J.(concurring in part and dissenting in part).

I concur with the majority's finding that the trial court erred in analyzing DeMattia's December 11, 1997 letter as a "counter-offer" to an existing "offer." There was no outstanding offer to be countered; there had been an offer and an acceptance previously, resulting in a completed contract. I do not agree that such error is harmless, however, because I do not agree with the majority that the trial court "reached the correct result, albeit for the wrong reasons."

While I am troubled that the December 11, 1997 letter came not from DeMattia Investments, a party to the contract, but from DeMattia Development, a related, but separate, corporation, I concur with the majority that American did not question Roberts' authority to speak for DeMattia Investments, and, in fact, negotiated with him over a substantial period of time. I do not agree, however, that just because both businesses used the same address, it can be inferred that the president of one has the authority to speak for, and bind, the other.

I respectfully dissent, however, from the majority's conclusion that the trial court was correct in granting summary disposition under MCR 2.116(C)(10) to DeMattia. The issue is whether there existed a genuine issue of material fact, considering the affidavits, pleadings, depositions, admissions, and documenting evidence submitted by the parties in the light most favorable to American, *Quinto v Cross & Peters Co.*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

The majority found that DeMattia's December 11, 1997 letter was a notice of dissatisfaction sufficient to terminate the contract under Paragraph 12 and, as a result, DeMattia was entitled to a refund of its earnest money deposit. I disagree.

The December 11, 1997 letter did not express dissatisfaction with the property. In fact, it stated that " . . . we still plan to move toward that goal" [referring to the purchase of the property]. That language is hardly consistent with an intention to terminate the contract. DeMattia's dissatisfaction was not with the property, but with the contract provision requiring an additional earnest money deposit of $100,000 in exchange for a 180 day extension of the Due Diligence Period to complete rezoning, among other matters.

As a result, DeMattia sought to renegotiate the contract to which it had previously agreed. In its December 11, 1997 letter, DeMattia stated that if American would not agree to DeMattia's proposed changes in the contract, ". . . we *will* have to terminate our agreement pursuant to Paragraph 12" (emphasis added). DeMattia's use of the word "will" evidences DeMattia's intent that the letter, to the extent that it could be interpreted as expressing dissatisfaction with the property, was not to act as a termination of the contract, but merely as an offer to renegotiate a provision of the contract, together with a threat to terminate the contract in the future if the renegotiation were not successful from DeMattia's perspective.

That DeMattia did not intend to terminate the contract by the December 11 letter, but merely threatened to terminate the contract at some future date if the contract were not renegotiated by American, is shown by DeMattia's first letter of December 18, 1997 in which it stated that if its proposed amendment to the contract were not acceptable to American, ". . . then as stated in my December 11, 1997, correspondence, it will be necessary for us to terminate our agreement pursuant to Paragraph 12." Therefore, as of December 18, 1997, three days after the earnest money deposit was no longer refundable, and seven days after DeMattia's alleged termination of the contract, DeMattia continued to refer to the contract as if it were still in existence and that any termination would be in the future (". . . will be necessary for us to terminate our agreement . . .").

Later on December 18, 1997, when DeMattia concluded that American would not renegotiate the terms of the contract, DeMattia sent American a second letter in which it attempted to retroactively characterize its December 11 letter as a termination letter.

As a result of the foregoing, I conclude that there did exist a genuine issue of material fact as to whether the contract had been terminated by DeMattia's December 11, 1997 letter. This is especially true when the evidence is reviewed in the light most favorable to the non-moving party, American.

Quinto, supra. As a result, I would hold that the trial court erred in granting summary disposition for DeMattia.

/s/ Donald S. Owens